TNB Fuel Services Sdn Bhd v China National Coal Group Corp

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(IM)2499–10 OF 2012 AND B-02(IM)2504–10 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
14 MAY 2013

Arbitration — Stay of proceedings — Grant of stay of proceedings — Breach of contract to supply coal — Notice of arbitration — Application for declaration that no arbitration agreement existed between parties — Whether arbitration agreement existed — Injunction restraining arbitration proceedings — Application to stay originating summons in favour of arbitration — Appeal against judgment of High Court in allowing injunction and refusing stay — Arbitration Act 2005 s 10

The appellant had called for tenders for long term supply of coal. The respondent submitted its bid which included: a duly completed bid form to supply coal for 15 years; a bid bond in the sum of RM500,000; and technical proposals for the supply of the coal. The appellant accepted the respondent's bid and issued a letter of acceptance which laid out terms of award. The respondent accepted the terms of the award and caused Standard Chartered Bank to furnish a pre-commencement bond for the amount of RM1m in favour of the appellant. However, the respondent then failed to supply the coal that it had promised the appellant for the said project citing changes in the policy of the Government of China. The appellant's response was to serve a notice of arbitration on the respondent. This caused the respondent to apply by way of originating summons ('the first OS') to the High Court for a declaration that no arbitration agreement existed between the parties. It also applied and obtained an ex-parte injunction order restraining the appellant from proceeding with the arbitration proceedings. The ex-parte order was then confirmed inter-partes after arguments before the High Court judge. While the appellant's appeal to the Court of Appeal against the injunction order was pending, the first OS was struck off when the respondent failed to comply with an order for security for costs. Following the dismissal of the first OS, the arbitral tribunal was fully-constituted. The respondent then filed an identical originating summons ('the second OS') in the High Court seeking similar orders as in its previous action and also an injunction application to once again injunct the arbitration proceedings. On the other hand, the appellant filed a stay application under s 10 of the Arbitration Act 2005 ('the Act') to stay the respondent's action in favour of arbitration. The appellant and the respondent attended the preliminary meeting fixed by the arbitral tribunal ('the Tribunal'). The respondent informed the Tribunal that it was challenging the jurisdiction

of the Tribunal to hear the dispute that was brought to arbitration by the appellant. The Tribunal agreed to hear the respondent's jurisdictional challenge as a preliminary issue. Directions were given by the Tribunal for parties to exchange pleadings and witness statements on the preliminary issue. A hearing date for the preliminary issue was fixed but the respondent obtained an ad-interim injunction before the High Court judge pending the hearing of the respondent's injunction application. As a result, the preliminary issue before the Tribunal was never heard. The respondent's injunction application was granted and the stay application was dismissed. This appeal was against the judgment of the Court in allowing the injunction and refusing stay.

Held, allowing the appeal with costs of RM15,000:

(1) Section 9 of the Act had introduced a significant change as regards the existence of an arbitration agreement. This change was the result of the expansion in the meaning of the words arbitration agreement between the Arbitration Act 1952 and the Act. Applying the new definition of arbitration agreement to the facts of this case, the application for the injunction in the second OS ought to have been determined based on an examination of all the documents exchanged between the parties to determine whether there was an agreement in writing and whether there was sufficient reference in this agreement to the document containing the arbitration agreement so as to entitle the court to conclude that the arbitration agreement formed part of the agreement between the parties. The High Court judge considered the merits of the respondent's application for the injunction on the basis of the Arbitration Act 1952 and not the Act, which ought to have been the case (see paras 18–20).

(2) The trial judge erred in not considering the application for the injunction on the basis of sub-s 9(5) of the Act. The fact of the matter was that the exchange of documents between the parties which included the bid form and supporting bid bond from the respondent, the letter of award by the appellant and the letter from the respondent confirming acceptance of the terms in the letter of award constituted the requisite offer and acceptance thereby creating a binding contract. This contract, in turn, incorporated the terms of the unsigned coal purchase contract thereby incorporating by reference the arbitration agreement in this document (see para 21).

(3) If the trial judge had applied s 9(5) of the Act to these facts, she would have come to the conclusion that the arbitration agreement was binding on the parties. In any event, the trial judge entertained any doubts concerning the existence of the arbitration agreement, she ought to have leaned in favour of refusing the injunction so as to enable this jurisdictional issue to be determined by the arbitral tribunal (see para 21).

(4) The trial judge erred in failing to appreciate that the balance of

convenience was also in favour of the appellant. At the time of the hearing of the injunction application, the arbitral tribunal was fully-constituted and ready to hear the respondent's jurisdictional challenge. The tribunal already held the meeting to discuss the issue of the respondent's objection to the tribunal's jurisdiction and a preliminary meeting already having been directed on this issue for hearing. This hearing did not proceed because of the respondent having obtained the ad interim injunction (see para 22).

(5) The order of the High Court granting the injunction restraining the appellant from proceeding with the arbitration proceedings was set aside. The order of the High Court refusing a stay of the pending arbitration proceedings was also set aside. The court ordered further proceedings in the second OS be stayed pursuant to s 10 of the Act (see para 24).

[Bahasa Malaysia summary

Perayu telah memanggil untuk tender-tender bekalan arang batu untuk jangka masa panjang. Responden telah mengemukakan bidaannya yang termasuk: borang bidaan yang telah pun dilengkapkan untuk 15 tahun; bon bidaan berjumlah RM500,000; dan cadangan-cadangan teknikal untuk bekalan arang batu itu. Perayu telah menerima bidaan responden dan telah mengeluarkan surat penerimaan yang menyatakan terma-terma award tersebut. Responden telah menerima terma-terma award terebut dan menyebabkan Bank Standard Chatered mengeluarkan bon pra permulaan untuk jumlah RM1 juta bagi pihak perayu. Walau bagaimanapun, reponden kemudian telah gagal untuk membekalkan arang batu yang dijanjikan kepada perayu untuk projek tersebut dengan menyatakan perubahan-perubahan dalam polisi Kerajaan China. Perayu menjawab akan menyampaikan notis timbang tara ke atas responden. Ini menyebabkan responden memohon melalui saman pemula ('SP pertama') kepada Mahkamah Tinggi untuk satu deklarasi bahawa tiada pejanjian timbang tara wujud antara pihak-pihak. Ia juga memohon dan memperoleh perintah injunksi ex parte yang menghalang perayu daripada meneruskan prosiding timbang tara. Perintah ex parte itu kemudian mengesahkan inter partes selepas dihujahkan di hadapan hakim Mahkamah Tinggi. Semasa rayuan perayu kepada Mahkamah Rayuan terhadap perintah injunksi masih belum selesai, SP pertama telah dibatalkan apabila responden gagal mematuhi perintah untuk jaminan kos. Berikutan penolakan SP pertama, tribunal timbang tara telah ditubuhkan sepenuhnya. Responden kemudian memfailkan saman pemula yang sama ('SP kedua') di Mahkamah Tinggi memohon perintah-perintah yang sama seperti dalam tindakan sebelumnya dan juga permohonan injunksi untuk sekali lagi menginjunksikan prosiding timbang tara. Sebaliknya, perayu telah memfailkan permohonan penggantungan di bawah s 10 Akta Timbang Tara 2005 ('Akta tersebut') untuk menggantung tindakan responden dan menyokong timbang tara. Perayu dan responden telah menghadiri mesyuarat awal yang ditetapkan oleh tribunal

timbang tara ('tribunal tersebut'). Responden memberitahu tribunal tersebut bahawa ia telah mencabar bidang kuasa tribunal tersebut untuk mendengar perikaian yang dikemukakan kepada timbang tara oleh perayu. Tribunal tersebut bersetuju untuk mendengar cabaran bidang kuasa responden sebagai isu permulaan. Arahan-arahan telah diberikan oleh tribunal tersebut untuk pihak-pihak bertukar-tukar pliding dan kenyataan saksi berhubung isu permulaan itu. Tarikh perbicaraan untuk isu permulaan itu telah ditetapkan tetapi responden telah memperolahi injunksi ad interim di hadapan hakim Mahkamah Tinggi untuk menunggu sementara selesai perbicaraan permohonan injunksi responden. Akibatnya, isu permulaan di hadapan tribunal tersebut tidak didengar. Permohonan injunksi responden telah dibenarkan dan penggantungan permohonan telah ditolak. Ini adalah rayuan terhadap penghakiman mahkamah kerana membenarkan injunksi dan menolak penggantungan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000:

(1) Seksyen 9 Akta tersebut telah memperkenalkan perubahan ketara berkaitan kewujudan perjanjian timbang tara. Perubahan ini adalah akibat peluasan maksud perkataan-perkataan perjanjian timbang tara antara Akta Timbang Tara 1952 dan Akta tersebut. Dengan menggunakan definii baru perjanjian timbang tara kepada fakta kes ini, permohonan untuk injunksi dalam SP kedua patut ditentukan berdasarkan pemeriksaan semua dokumen yang bertukaran antara pihak-pihak untuk menentukan sama ada terdapat perjanjian secara bertulis dan sama ada terdapat rujukan mencukupi dalam perjanjian ini tentang dokumen yang mengandungi perjanjian timbang tara untuk membenarkan mahkamah memutuskan bahawa perjanjian timbang tara itu membentuk sebahagian daripada perjanjian antara pihak-pihak tersebut. Hakim Mahkamah Tinggi telah mengambil kira merit-merit permohonan responden untuk injunksi berdasarkan Akta Timbang Tara 1952 dan bukan Akta tersebut, yang patut dibuat sedemikian (lihat perenggan 18–20).

(2) Hakim perbicaraan terkhilaf kerana tidak mengambil kira permohonan injunksi berdasarkan sub-s 9(5) Akta tersebut. Fakta perkara itu adalah bahawa pertukaran dokumen antara pihak-pihak yang termasuk borang bidaan dan sokongan bon bidaan daripada responden, surat award oleh perayu dan surat daripada responden yang mengesahkan penerimaan terma-terma dalam surat award itu membentuk tawaran dan penerimaan yang diperlukan untk membentuk kontrak yang mengikat. Kontrak ini, seterusnya, membentuk terma-terma kontrak belian arang batu yang tidak ditandatangani dan seterusnya membentuk melalui rujukan perjanjian timbang tara dalam dokumen ini (lihat perenggan 21).

(3) Jika hakim perbicaraan telah mengguna pakai s 9(5) Akta tersebut

kepada fakta berikut, beliau akan tiba kepada kesimpulan bahawa perjanjian timbang tara itu adalah mengikat ke atas pihak-pihak itu. Dalam apa keadaan, hakim perbicaraan mengambil kira apa-apa keraguan berkaitan kewujudan perjanjian timbang tara, beliau patut lebih bersetuju untuk menolak injunksi itu agar isu bidang kuasa ditentukan oleh tribunal timbang tara (lihat perenggan 21).

(4) Hakim perbicaraan terkhilaf kerana gagal menyedari bahawa imbangan kesesuaian juga menyebelahi perayu. Pada masa perbicaraan permohonan injunksi, tribunal timbang tara telah ditubuhkan sepenuhnya dan bersedia untuk mendengar cabaran bidang kuasa responden. Tribunal tersebut telahpun mengadakan mesyuarat untuk membincangkan isu tentang bantahan repsonden terhadap bidang kuasa tribunal tersebut dan mesyuarat permulaan telahpun diarahkan berhubung isu ini untuk dibicarakan. Perbicaraan ini tidak dijalankan kerana responden telah mendapatkan injunksi ad interim (lihat perenggan 22).

(5) Perintah Mahkamah Tinggi membenarkan injunksi menghalang perayu daripada meneruskan prosiding timbang tara telah diketepikan. Perintah Mahkamah Tinggi yang enggan menggantung prosiding timbang tara yang belum selesai juga telah diketepikan. Mahkamah memerintahkan prosiding selanjutnya dalam SP kedua digantung menurut s 10 Akta tersebut (lihat perenggan 24).]

Notes

For cases on grant of stay of proceedings, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1963–1964.

Cases referred to

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656; [2010] 7 CLJ 785, CA (refd)

CMS Energy Sdn Bhd v Poscon Corp [2008] 6 MLJ 561, HC (folld)

Dell Computer Corporation v Union des consommateurs [2007] 2 SCR 801; 2007 SCC 34, CA (refd)

Tjong Very Sumito and others v Antig Investments Ptd Ltd [2009] 4 SLR 732, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 6, 8, 9, 9(5), 10, 10(1), 18, 18(1)

Appeal from: Originating Summons No 24–1925 of 2011 (High Court, Shah Alam)

Mohan Kanagasabai (Sheena Babu with him) (Mohanadass Partnership) for the appellant.

Wong Kah Hui (Chan Yee Chong and Kuah Jiun Yin with him) (Jeff Leong, Poon & Wong) for the respondent.

Anantham Kasinather JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] In 2002, the appellant called for tenders for the long term supply of coal for its Tanjung Bin Power Project. The tender documentation provided to the respondent included the proforma coal purchase contract, bid form, and form of bid bond.

[2] On or about 4 December 2012, the respondent submitted its bid which included:

(a) a duly completed bid form to supply coal for 15 years. This form was signed by the respondent's deputy managing director, Mr Pan Wanze;

(b) a bid bond dated 2 December 2002, issued jointly by Standard Chartered Bank (M) Bhd and the respondent in the sum of RM500,000; and

(c) technical proposals for the supply of the coal.

[3] The joint bid bond submitted by the respondent was signed by one William Randall who was the lawful attorney of the respondent, pursuant to a power of attorney issued by the respondent on 26 November 2002 duly notarised in Hong Kong. This power of attorney authorised Randall to negotiate a contract on behalf of the respondent to supply coal to the appellant.

[4] The appellant accepted the respondent's bid and issued a letter of acceptance dated 18 November 2003 which included, inter alia, the following terms:

(a) that the terms and conditions of the supply shall be in accordance with the proforma coal purchase contract;

(b) the respondent to provide a bond for the due and proper performance of the contract;

(c) the respondent to appoint a local agent; and

(d) the respondent to acknowledge acceptance of the terms and conditions in the letter of acceptance within 14 days of the receipt of the letter of acceptance.

[5] By its letter of 18 December 2003 signed by one Zhou Dongzhou, the respondent accepted the terms of the award and at the same time appointed a company known as Fasa Galian Sdn Bhd, represented by its attorney William Randall and one PC Yong, as its local agent. After accepting the award of the contract, the respondent caused Standard Chartered Bank to furnish a pre-commencement bond dated 15 March 2004 for the amount of RM1m in favour of the appellant. Standard Chartered Bank confirms on the face of this bond that it was issued 'on behalf of and at the request of our client, China National Coal Group Corp' ie the respondent. This pre-commencement bond was extended twice by the respondent. Both extensions included reference to the extensions having been effected at the request of the respondent.

[6] According to the appellant, in breach of its obligations, the respondent then failed to supply the coal that it had promised the appellant for the said project citing changes in the policy of the Government of China. The appellant's response was to serve a notice of arbitration on the respondent on 13 August 2009. This caused the respondent to apply by way of originating summons to the High Court in Shah Alam OS No 24–281 of 2010 ('the first OS') for a declaration that no 'arbitration agreement' existed between the parties. It also applied and obtained an ex parte injunction order before YA Dato' Zaleha Yusof restraining the appellant from proceeding with the arbitration proceedings.

[7] The ex parte order was then confirmed inter partes after arguments before YA Dato' Zaleha bt Yusof on 29 July 2010. While the appellant's appeal to the Court of Appeal against the injunction order was pending, the first OS was struck off when the respondent failed to comply with an order for security for costs. Following the dismissal of the first OS, the arbitral tribunal was fully constituted on 12 July 2011. The respondent then filed a virtually identical originating summons in the High Court of Shah Alam on 27 July 2011 (OS 24–1925 of 2011 — 'the second OS') seeking similar orders as in its previous action and also an injunction application (encl 3) to once again injunct the arbitration proceedings. The appellant on the other hand filed a stay application (encl 13) under s 10 of the Act to stay the respondent's action in favour of arbitration.

[8] The appellant and the respondent attended the preliminary meeting fixed by the arbitral tribunal on 24 August 2011. The respondent informed the Tribunal that it was challenging the jurisdiction of the tribunal to hear the dispute that was brought to arbitration by the appellant. The tribunal agreed to hear the respondent's jurisdictional challenge as a preliminary issue. Directions were given by the tribunal for parties to exchange pleadings and witness statements on the preliminary issue. A hearing date for the preliminary issue was fixed from 12–16 December 2011. However, on 25 August 2011, the

respondent obtained an ad-interim injunction before YA Dato' Zaieha bt Yusof pending the hearing of the respondent's injunction application. As a result, the preliminary issue before the tribunal was never heard.

[9] On 24 September 2012, the respondent's injunction application was granted by the Learned Justice Hadhariah bt Syed Ismail. In the same judgment, Her Ladyship dismissed the stay application in encl 13. This appeal is from the judgment of the court of 24 September 2012 allowing the injunction and refusing stay.

THE APPELLANT'S CASE

[10] In connection with the appellant's tender for the long term supply of coal, the following documents were exchanged between the appellant and the respondent. The tender notice, bid form, the supporting bid bond from the respondent, the letter of award of the appellant and the letter from the respondent confirming acceptance of the terms in the letter of award. The tender notice included amongst its documents the proforma coal purchase contract. The arbitration clause or the 'arbitration agreement' in turn was included in the unsigned proforma coal purchase contract. Learned counsel for the appellant submitted that notwithstanding that the proforma coal purchase contract was unsigned, a binding contract had come into existence and the arbitration clause or agreement binding on the parties by virtue of the operation of s 9(5) of the Arbitration Act 2005 ('the Act').

[11] In support of learned counsel's reliance on s 9(5) of the Arbitration Act 2005 ('the Act'), we were referred to the passage in the judgment of this court in *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656; [2010] 7 CLJ 785 that:

> Section 9(5) of the Arbitration Act 2005 ('the Act') provides for the incorporation of an arbitration clause in a document into an agreement to constitute the latter as an arbitration agreement to which the Act shall apply. This is known as incorporation by reference. … It is clear from a reading of the above provision that the agreement itself need not have arbitration clause in it as long as the agreement refers to an arbitration clause in another document and the agreement is in writing and the reference incorporates the said clause into the agreement, (at p 674(MLJ); pp 805–806 (CLJ)).

[12] Learned counsel for the appellant then proceeded to refute the allegation of the respondent contained in the affidavit of one Zhou Li that the respondent had no knowledge of this transaction with the appellant and that the signature of Zhou Dongzhou on its letter of 18 December 2003 was a forgery. In this respect, learned counsel for the appellant highlighted that notwithstanding that the respondent had lodged a report on 2 February 2010,

there is no evidence of any investigation or action taken on this report at the time of the decision of the learned judge on 24 September 2012. The suggestion being that the police report was lodged purely in support of the injunction application. This suggestion, according to counsel for the appellant, is fortified by the fact that neither Pan Wanze or Zhou Dongzhou have provided any sworn evidence denying their respective signatures on the bid form and the letter of acceptance. Finally, reference was made by learned counsel for the appellant to the absence of any explanation as to how the Standard Chartered Bank could have recited in two guarantees to having issued the same on the instructions of the respondent, if the respondent had no knowledge of this transaction.

[13] On the law, learned counsel for the appellant submitted that the courts have leaned in favour of arbitration even when the 'arbitration agreement' was disputed. The rational for this being the availability of challenge to the jurisdiction of the tribunal prior to the commencement of the proceedings. Section 18 provides for jurisdictional challenge by allowing the arbitral tribunal to decide on the 'existence or validity of the arbitration agreement'. A passage in the commentary of the *Malaysian Arbitration Act 2005* by Sundra Rajoo and WSW Davidson to the following effect:

> Section 18 deals with the issue of who is to decide on the arbitral tribunal's jurisdiction and corresponds with article 16 of the Model Law. It is one of the key pillars of the Model Law. Like article 16, Section 18 sets out two general principles, namely the doctrines of Kompetenz-Kompetenz and separability. The remaining parts of the section deal with the prescribed procedures for raising a plea of the arbitral tribunal's lack of jurisdiction, including the relevant time limits for raising it. The last part of the section provides however, a plea is dealt with -initially by the arbitral tribunal and later by the High Court which has the last word on the issue of an arbitral tribunal's jurisdiction.

was cited to us in support of this proposition.

[14] According to learned counsel for the appellant, Abdul Aziz J (as His Lordship then was) in *CMS Energy Sdn Bhd v Poscon Corp* [2008] 6 MLJ 561 made pronouncements to similar effect when His Lordship said:

> Clearly therefore in this case one of the issues is the existence of the JV and whether the defendant did execute the purported JV agreement … In my view these questions may be posed to the arbitrator and the arbitrator is competent to answer them.
>
> In my view the language used in (Section 18(1) of the 2005 Act) confers on the arbitration a broad and wide powers to decide on issues raised before it — not only the substantive issues but also on the point of preliminary objections as to its jurisdiction.

> In my view if ss 10– 18 of the Act are read together there is no unmistakable intention of the legislature that the court should lean towards arbitration proceedings.

[15] On the issue of stay, learned counsel for the appellant submitted that since our legislation on arbitration is pari materia with Canadian legislation, our courts should have regard to precedents originating from that jurisdiction. Pursuant thereto, we were referred by counsel to the case of *Dell Computer Corp v Union des consommateurs* [2007] 2 SCR 801; 2007 SCC 34 ; [2007] SCJ No 34 where the court laid down the following principles and guidelines:

> In a case involving an arbitration agreement, any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator in accordance with the competence — competence principle, which has been incorporated into art 943 CCP. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception, which is authorized by art 940 1 CCP, is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court must refer the case to arbitration unless the questions of act require only superficial consideration of the documentary evidence in the record. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding.

THE RESPONDENT'S CASE

[16] The respondent's primary contention, in gist, is that it never entered into any 'arbitration agreement', ie the proforma coal purchase contract or any other contract with the appellant. Since the claim to arbitration is premised on an existing contract, the absence of a contract defeats the basis for arbitration. According to learned counsel for the respondent, the absence of a contract is evident from the fact that the appellant has not been able to produce the signed contract pursuant to the numerous applications for discovery. It is the submission of learned counsel for the respondent that it is settled law that the arbitrator(s) only has jurisdiction to hear a particular dispute where there is an arbitration clause in a signed contract entered between parties. There is no other source for the arbitrators to derive jurisdiction.

[17] Learned counsel for the respondent then submitted that the pertinent issue: 'whether there was a signed and executed CPC'? has actually been

determined by Justice Dato' Zaleha bt Yusof in 'the first OS', before the identical issue was determined for the second time by Justice Hadariah bt Syed Ismail in 'the second OS'. Justice Zaleha had ruled that:

> there is no proof that the parties have entered into a valid arbitration agreement.

Hadariah J adopted this reasoning in allowing the injunction application.

DECISION OF THE COURT

Injunction application

[18] In our judgment, s 9 of the Arbitration Act 2005 has introduced a significant change as regards the existence of an 'arbitration agreement'. This change is the result of the expansion in the meaning of the words 'arbitration agreement' between the Arbitration Act 1952 and the Arbitration Act 2005. In the Arbitration Act 1952, the word 'arbitration agreement' was defined to mean:

> a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

In the 2005 Act, the same term has been defined in s 9 as follows:

> 9(1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing;
>
> (4) An arbitration agreement is in writing where it is contained in —
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or
>
> (c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[19] Section 9(5) provides that a reference in an agreement to a document containing an arbitration clause shall constitute an 'arbitration agreement', provided that the agreement is in writing and the reference is such as to make

that clause part of the agreement. The inclusion of the clause providing for arbitration to form part of the agreement can be said to be under the doctrine of 'incorporation by reference'. There are presently authorities originating from Hong Kong, England and Canada where a clause providing for arbitration has been held to give rise to an 'arbitration agreement' notwithstanding that the document containing the clause was not signed by either party. In other words, the courts in these jurisdictions recognise that parties may enter into a valid 'arbitration agreement' by entering into a contract that incorporates by reference to another document that provides for arbitration.

[20] Applying the new definition of 'arbitration agreement' to the facts of this case, the application for the injunction in 'the second OS' ought to have been determined based on an examination of all the documents exchanged between the parties to determine whether there was an agreement in writing and whether there was sufficient reference in this agreement to the document containing the 'arbitration agreement' so as to entitle the court to conclude that the 'arbitration agreement' formed part of the agreement between the parties. With respect, the learned High Court judge, in our judgment, considered the merits of the respondent's application for the injunction on the basis of the Arbitration Act 1952 and not the Arbitration Act 2005, which ought to have been the case. We opine to this effect because of the following reasoning adopted by the learned High Court judge in allowing the application for the injunction restraining the appellant from proceeding with the pending arbitration:

> My own observation of the proforma coal purchase contract which contained the arbitration clause is it is incomplete and do not have the signatures of the parties. The signing page is blank. On this ground alone, the plaintiff has a legitimate complaint.

[21] With respect, in our judgment, the learned trial judge erred in not considering the application for the injunction on the basis of sub-s 9(5) of the Arbitration Act 2005. The fact of the matter is that the exchange of documents between the parties which included: the bid form and supporting bid bond from the respondent, the letter of award by the appellant and the letter from the respondent confirming acceptance of the terms in the letter of award constitutes the requisite offer and acceptance thereby creating a binding contract. This contract, in turn, incorporated the terms of the unsigned coal purchase contract thereby incorporating by reference the 'arbitration agreement' in this document. Against these background facts, in our judgment, if the learned trial judge had applied s 9(5) of the Act to these facts, we are of the considered opinion that Her Ladyship would have come to the conclusion that the 'arbitration agreement' was binding on the parties. In any event, in our opinion, even if Her Ladyship entertained any doubts concerning the existence of the 'arbitration agreement', Her Ladyship ought to have leaned in favour of

refusing the injunction so as to enable this jurisdictional issue to be determined by the arbitral tribunal following the pronouncements of the court in the authorities of *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* and *CMS Energy Sdn Bhd v Poscon Corp* and the passage in the book of *Malaysian Arbitration Act 2005* by Sundra Rajoo and WSW Davidson recited in paras 11, 14 and 13 respectively in this judgment.

[22] Additionally, with respect, in our judgment, Her Ladyship erred in failing to appreciate that the balance of convenience was also in favour of the appellant. We opine to this effect because at the time of the hearing of the injunction application, the arbitral tribunal was fully constituted and ready to hear the respondent's jurisdictional challenge. The tribunal having already held the meeting to discuss the issue of the respondent's objection to the tribunal's jurisdiction on 24 August 2011 and a preliminary meeting already having been directed on this issue for hearing from 12–16 December 2011. This hearing did not proceed because of the respondent having obtained the ad interim injunction. In this respect, it is pertinent to observe that pursuant to s 18 of the Arbitration Act 2005, the tribunal is competent to rule on its own jurisdiction based on the 'competence principle' recited in the judgment of the court in the case of *Dell Computer Corporation, v Union des consommateurs* (recited in para 15 of this judgment) and which principle is acknowledged to be applicable in this country by the authors of the book, Sundra Rajoo and WSW Davidson (see para 13 of this judgment). In this respect, it is evident that Her Ladyship when considering the respondent's application for the injunction erroneously assumed that only the High Court can determine the 'competence principle'. This is evident from para (c) of Her Ladyship's judgment, wherein Her Ladyship ruled that:

> The plaintiff's originating summons has raised various issues and only the High Court can determine those issues. These issues must be determined first before the matter can be referred to arbitration. If the High Court ruled in favour of the plaintiff, there is no necessity to refer this case to arbitration.

Accordingly, by ruling in her written grounds when allowing the injunction that the contract did not incorporate the 'arbitration agreement', Her Ladyship had effectively ruled on a matter which the Arbitration Act 2005 clearly recognised as falling within the jurisdiction of the arbitral tribunal.

Stay application

[23] The new definition of the words 'arbitration agreement' in s 9 of the Arbitration Act 2005 is not the only significant difference between the old and new Arbitration Acts. The circumstances under which a court of law should grant a stay has also been revised under the new Arbitration Act of 2005. Section 6 of the Arbitration Act 1952 reads as follows:

> 6 If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The amended s 10(1) of the Arbitration Act 2005 reads as follows:

> 10(1) A Court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[24] The present form of s 10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1 July 2011 (Act A1395). It is generally accepted that the effect of the amendment is to render a stay mandatory unless the agreement is null and void or impossible of performance. The court is no longer required to delve into the facts of the dispute when considering an application for stay. Indeed, following the decision of the court in *CMS Energy Sdn Bhd v Poscon Corp*, a court of law should lean towards compelling the parties to honour the 'arbitration agreement' even if the court is in some doubt about the validity of the 'arbitration agreement'. This is consistent with the 'competence principle' that the arbitral tribunal is capable of determining its jurisdiction, always bearing in mind that recourse can be had to the High Court following the decision of the arbitral tribunal. In this respect, we pause to observe that even the Singapore Court of Appeal in a very recent decision opined as follows on the question of stay:

> … Woo J was quick to add this important caveat that if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered. We agree with the measured approach taken by Woo J since the question of whether a matter is the subject of an arbitration agreement is the very threshold to the application of s 6 of the IAA itself. However, it is only in the clearest of cases that the court ought to make a ruling on the inapplicability of an arbitration agreement.

(see the case of *Tjong Very Sumito and others v Antig Investments Ptd Ltd* [2009] 4 SLR 732).

For the reasons contained herein and the provisions of s 8 of the 2005 Act which states that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', we allowed both appeals. The order of the

A High Court granting the injunction restraining the appellant from proceeding with the arbitration proceedings is hereby set aside. The order of the High Court refusing a stay of the pending arbitration proceedings is hereby set aside. We hereby order further proceedings in Originating Summons No 24–1925 of 2011 be stayed pursuant to s 10 of the Arbitration Act 2005. The respondent B is hereby ordered to pay costs of RM15,000 as costs here and below to the appellant in respect of both appeals. The deposit is hereby refunded to the appellant.

Appeal allowed with costs of RM15,000.

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Reported by Afiq Mohamad Noor

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